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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71- 71-1526

THOMAS S. EISENSTADT,
Sheriff of Suffolk County,
PETITIONER,

v.

I. CHARLES BAKER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Attorney General of the Commonwealth of Massachusetts, on behalf of the Sheriff of Suffolk County of the Commonwealth, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on February 23, 1972.

Opinions Below

The opinion of the court of appeals (App. D., infra, pp. 44-65) is not yet reported. The opinion of the district

court (App. C., infra, pp. 37-43) is not yet reported. The first opinion of the Supreme Judicial Court of Massachusetts on respondent's claim of immunity (App. A., infra, pp. 12-18) is reported at 1971 Massachusetts Advance Sheets 1689. The second opinion of the Supreme Judicial Court concerning respondent's sentencing (App. B., infra, pp. 19-36) is reported at 1971 Massachusetts Advance Sheets 1817.

Jurisdiction

The judgment of the court of appeals (App. E., infra, p. 66) was entered on February 23, 1972. We invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Questions Presented

1. Did respondent's refusals to answer questions during the proceedings before the Supreme Judicial Court of Massachusetts constitute multiple contempts or a single contempt?
2. Did the court of appeals err in ordering respondent released if the Supreme Judicial Court did not revise his sentence to one not exceeding five months rather than requiring a new hearing before the Supreme Judicial Court?

Constitutional Provision Involved

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ."

Statement

Baker, the respondent, was called to testify during the course of proceedings held before five Justices of the Massachusetts Supreme Judicial Court with respect to allegations of misconduct on the part of two Massachusetts Superior Court judges. He claimed that, if he were required to testify, he might incriminate himself, and "that insofar as he is able and permitted, he will plead the 4th and 5th Amendment in answer to various questions." (Tr. 726) [1]

In response to Baker's claim, the Commonwealth stipulated that he would be afforded a broad grant of immunity from prosecution with respect to the matters to be inquired into. The stipulation was twice amended at the urging of the Supreme Judicial Court (App. B, p. 35), and the Court filed an opinion with respect to Baker's assertion of his Fifth Amendment rights (App. A). In that opinion, the Court found that Baker was fully protected by the Commonwealth's stipulation (Id. at 14).

Baker was then recalled to the stand (Tr. 1225) on the ninth day of the hearing, November 29, 1971. Forty-six separate questions were put to him (Tr. 1226-1261), and to each question his response was:

> "Relying on the Fourth and Fifth Amendments to the Constitution of the United States, I respectfully decline to answer." (Tr. 1226, *et seq.*)

The Court adjudged petitioner to be in contempt for each refusal to answer a question put to him by the Court's Special Counsel and counsel for the two Superior Court

[1] Transcript references are to the transcript before the Supreme Judicial Court. A copy of that transcript was included in the return to the petition for habeas corpus.

judges, and the adjudications took place immediately upon Baker's refusal to testify.

Sentences on twelve of the contempts were imposed on November 29, 1971, and at that time Baker was sentenced to five months' imprisonment for each of the twelve counts, all sentences to be served concurrently. His application for a stay of sentence was denied by the Supreme Judicial Court, his application for bail pending a hearing on his petition for habeas corpus filed with the district court on the same day was denied by that court, and an application for bail pending review by the court of appeals was denied by that court on December 1, 1971.

On December 1, 1971, at the conclusion of the hearing before the Supreme Judicial Court, Baker was brought before the Court for sentencing on the remaining contempts. At that time the Court imposed sentences in four groups (see App. B, pp. 32-35). The sentences were all for six months on each of twenty-three contempts. The sentences within each group were to be served concurrently, and "the sentence for each group [was] to begin 'on and after' that for the prior group." (App. D, p. 47).

Baker then amended his petition for habeas corpus filed in the district court pursuant to 28 U.S.C. § 2254, and the district court heard the petition on the merits on December 10, 1971. Subsequent to the district court hearing, the Supreme Judicial Court filed its opinion (App. B) concerning the sentencing. On December 27, 1971, the district court filed an opinion in which it found that "petitioner has failed to show that the action of the state court violated any of his Federal constitutional rights." (App. C, p. 43) The Court entered an order dismissing the petition, Baker appealed, and the district court issued a certificate of probable cause.

On appeal, the court of appeals rejected Baker's claims that (1) the grant of immunity was deficient; (2) the

contempts were civil, not criminal; and (3) the Supreme Judicial Court had no power to summarily adjudicate him guilty of contempts. However, relying on the double jeopardy clause of the Fifth Amendment the court determined that Baker's refusals to answer the questions asked him constituted one contempt as opposed to multiple contempts (App. D, p. 65). The court then remanded the case to the district court with directions to issue the writ if the aggregate sentence imposed on Baker was "not revised so that it will not exceed five months." (App. D, p. 65).

Reasons For Granting The Writ

This case presents a direct conflict between a decision of the highest court of a state and a Federal court of appeals "on a matter so intimately related to [the state] court's own dignity" (App. D, p. 61) and to the very integrity of the judicial system of Massachusetts. In a proceeding involving charges of bribery and corruption against two state court judges, the respondent, Baker, was a crucial witness. He refused to testify, even though, as both the Federal and state courts found, he was accorded full and complete immunity (App. A, p. 14; App. C, p. 40; App. D, p. 50). His refusal to answer some forty-six separate questions were found by the Supreme Judicial Court to be contemptuous of the Court's dignity, and he was adjudicated in contempt for each refusal.

The Supreme Judicial Court, in its opinion on the sentencing (App. B) carefully and painstakingly analyzed the issue of whether the refusals to answer the questions constituted a single contempt or multiple contempts. The Court first stated that "[o]nly one *penalty* for contempt can be imposed when separate questions are designed to establish but a single fact, or relate to but a single subject of inquiry." (App. B, p. 27). The Court then stated:

> "[E]ach of Baker's refusals to answer after being ordered to do so by the court constituted a separate contempt. No question put by special counsel was repetitive. Each sought to elicit new facts. For the purpose of sentencing, however, this court divided the questions into broader subjects of inquiry. Group I contains twelve questions, each dealing in some way with Baker's involvements with Raymond in the fall of 1961 and the spring of 1962, ... The sentences imposed ... for the contempts within this group were concurrent. Our judgment of the proper penalty was not influenced by the fact that we found Baker guilty of twelve contemptuous acts, but by our feeling that a refusal to speak on this particular, definable subject matter merited five months in the common jail. ... *The penalty would have been the same whether we viewed this as one contempt or twelve. It was not possible to categorize, however, until special counsel had exhausted his examination.*" App. B, pp. 27-28, emphasis supplied.

The Court made clear that its reasoning applied with equal force to the sentences concerning each of the other four groups of questions.

The district court agreed that the refusals constituted multiple contempts, and it went on to approve of the groupings employed by the Supreme Judicial Court:

> "While the court found Baker separately in contempt as to each of his forty-six (46) failures to answer, it did not impose, as it theoretically might have done, forty-six separate sentences to be served consecutively. Instead, for purposes of imposing consecutive sentences, it divided the separate contempts into five (5) groups, the sentences in each group re-

lating to one particular phase of his activities in connection with this case as to which Baker was questioned. *Each of these groups of questions differed from the others as to time and place and as to the other persons alleged to have been involved with Baker.*

"In the circumstances of the case, such a grouping was based on substantial and rationally supporting grounds. It appears eminently fair and reasonable. Considering the public importance of the proceeding, and the extent to which the court might justifiably have considered Baker had, by his refusals to answer, impeded its efforts to arrive at all the facts, the total of the sentences imposed was not excessive—certainly not to the degree where it would approach an infringement on petitioner's constitutional rights." App. C, p. 43, emphasis supplied.

The court of appeals, however, proceeded to make its own analysis of the factual events preceding Baker's refusals to answer and concluded, contrary to both the Supreme Judicial Court and its own district court, that Baker had committed only one contempt. The court reached that conclusion by alternative analyses.

First, it found, in direct contradiction to the Supreme Judicial Court which had heard the testimony and had had numerous opportunities to observe Baker, that Baker's "contempt lay in refusing to testify at all on the subject of inquiry [and] that his communicated intent made it clear at the outset that the authority of the court was frontally challenged . . . ." App. D, p. 62.

We submit that the Supreme Judicial Court, not the court of appeals, was in the best position to make that determination, that the determination was a factual one, and that it depended upon personal observation of the witness and

the events that led to his questioning. It was improper for the court of appeals, upon review of a record transcript, to substitute its judgment in that regard for that of the Supreme Judicial Court.

Moreover, as the opinion of the Supreme Judicial Court makes clear, there was reasonable ground to believe that the witness might answer some questions and not others (App. B, p. 29). Thus, the reliance placed by the Supreme Judicial Court on *People* v. *Saperstein*, 2 N.Y.2d 210, 159 N.Y.S.2d 160, *cert. den.* 353 U.S. 946, was not, as the court of appeals stated, "misplaced." An analysis of the grouping of the questions put to the witness demonstrates that *People* v. *Saperstein* is directly in point.

Both the Supreme Judicial Court and the court of appeals referred to *Yates* v. *United States*, 355 U.S. 66 as having established the principle that a flat refusal to answer any questions constitutes but a single contempt. However, it is unclear whether this Court in *Yates* was establishing a constitutional rule applicable to Federal and state courts alike or a procedural rule which applied only to inferior Federal courts. The Supreme Judicial Court was of the opinion that *Yates* applies only to Federal courts, see App. B, p. 27, fn. 3. In *Yates*, this Court was reviewing sentences for contempt imposed by a Federal District Court, and as the ultimate arbiter of questions of Federal substantive law, the Court was free to adopt such a procedural rule. We submit, however, that the language in *Yates* falls far short of a direct constitutional holding, and there is not the slightest hint that the Court considered any constitutional principle to be involved. This case presents an opportunity to clarify the extent to which *Yates* applies in state court proceedings.

As an alternative course, the court of appeals applied the doctrine of waiver:

> "Apart from any staking out of a claim by petitioner at the outset of the questioning, a second approach to ascertaining the numerosity of contempts lies in considering whether and when petitioner, by answering a question, would, by the law of the Commonwealth, have waived his privilege as to the remaining questions." App. D, p. 62.

In so doing, the court of appeals openly ignored the grouping of the questions employed by the Supreme Judicial Court and speculated as to the Massachusetts law on waiver, see App. D, p. 63. The court's alternative analysis was clearly a bootstrap process, because, as all courts concerned with this case agreed, Baker had no privilege to refuse to testify in view of the grant of immunity accorded him.

The disposition of the case by the court of appeals raises a second important reason why the writ should be granted. The court remanded to the district court with directions to issue the writ if the sentence imposed on Baker was not revised so that it did not exceed five months. App. E, p. 66. Relying on *North Carolina* v. *Pearce*, 395 U.S. 711, the court of appeals was of the view that "due process would be violated by the imposition of a harsher sentence than that imposed for the first offense adjudicated." App. D, p. 65.

However, by categorizing Baker's refusal to answer questions as one contempt rather than forty-six separate contempts, the court of appeals drastically altered the character of the offense. The Supreme Judicial Court was of the view that each refusal in groups two through five merited a six month sentence:

> "The refusal to answer the questions in no one of these groups was made the basis of a sentence of more than six months." App. B, pp. 23-24.

The Court was clearly of the opinion that while each refusal constituted a "petty" offense, the totality of the offenses was severe:

> "We recognize that our decision to impose consecutive sentences may be subject to constitutional limits. We consciously attempted to avoid imposing sentences so long in the aggregate as conceivably to violate constitutional limitations ... In this respect the aggregate sentences imposed ... are not excessive. The punishment imposed is fully warranted in view of the great importance of this proceeding to the integrity of the judicial system of the Commonwealth, and in view of the seriously obstructive and contumacious action of Baker." App. B, p. 30.

If the court of appeals was correct in its determination that Baker's refusals to answer constituted a single contempt, it should have, by the same token, viewed the penalty imposed by the Supreme Judicial Court as one of twenty-nine months and not five months. Accordingly, if the holding of *North Carolina* v. *Pearce* does apply here, the Supreme Judicial Court, on a retrial of the contempt, would only be prevented from imposing a penalty greater than twenty-nine months. Therefore, it was error for the court of appeals to hold that Baker's sentence must be revised to one of no more than five months.

Subsidiary to this question is the nature of the re-trial to which Baker is entitled. This Court's opinion in *Bloom* v. *Illinois,* 391 U.S. 194 seems to say that disorders in the courtroom are to be treated the same as other crimes insofar as the right to a jury trial is concerned. In *Bloom*, the Court declined to "make exception to the rule we establish today for disorders in the courtroom." 391 U.S. at 210. However, the language of the opinion is susceptible to an interpre-

tation that the Court was only considering contempts in the courtroom which were petty in nature:

> "By deciding to treat criminal contempts like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury." *Ibid.*

The opinion is silent as to contempts in the courtroom which are not petty and which merit a penalty of more than six months imprisonment.

Accordingly, the instant case presents a situation where we ask the Court to decide whether *Bloom's* guarantee of a jury trial for serious contempts applies to serious contempts committed in open court where, as the district court found, "[t]here is no factual issue involved for a jury to decide." App. C, p. 41. Compare the second opinion of the Supreme Judicial Court, App. B, p. 25, where the Court observed that "[t]here have been no Federal cases which have decided that a right to jury trial exists where the contempt punished occurred in an orderly court room in the absence of any genuine dispute as to the facts." As a result of the disposition made by the court of appeals, this case has now become the first such case.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
Attorneys for Petitioner

May 1972.

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

In the MATTER of EDWARD J. DESAULNIER, JR. & another.

Suffolk. — November 29, 1971.

Present: TAURO, C.J., CUTTER, REARDON, QUIRICO, & BRAUCHER, JJ.

Constitutional Law, Self-incrimination, Waiver. *Witness*, Self-incrimination. *Waiver*. *Practice, Criminal*, Agreement for immunity from prosecution. *Information*.

During the hearings by the Supreme Judicial Court in this matter one I. Charles Baker, when called as a witness, refused to answer certain questions, asserting his constitutional privilege against self-incrimination. On November 29, 1971, the court made the following findings, rulings, and order.

FINDINGS OF FACT.

The court makes the following findings.

1. The witness I. Charles Baker was interrogated by the State Police on August 5, 1971. He was interrogated on August 25, 1971, under oath by Chief Justice McLaughlin of the Superior Court pursuant to a letter from the Chief Justice to Baker, dated August 20, 1971, a copy of which is attached hereto (exhibit A). Baker's counsel was with him and consulted with him freely at each interrogation. He made an answer to each question. At no time during either interrogation did Baker claim any privilege or suggest that his answers might incriminate him. The questions and answers on each occasion were recorded stenographically and have been transcribed. Only the questions (with

the exception of a few questions deleted by agreement of counsel) are before us.

2. The present proceeding on the two informations is in practical effect a continuation of the inquiry into the same charges and judicial conduct, as the inquiry initiated prior to August 25, 1971, by Chief Justice McLaughlin of which the interrogation of Baker on that day was a part.

3. The statute of limitations has run on every substantive criminal offence committed before January 1, 1965, which is suggested in any way by the evidence. There is no suggestion in the evidence or otherwise that Baker has committed any substantive offence (e.g. murder, treason, robbery while armed or by putting in fear) for which the statute of limitations (State or Federal) exceeds six years. See G. L. c. 277, § 63, as amended through St. 1955, c. 781, § 1; c. 265, §§ 17 (as amended through St. 1952, c. 406, § 1), 18, 19, and 21. See also 18 U. S. C. §§ 3281-3291 (1964); Int. Rev. Code of 1954, § 6531.

4. Indictments are pending in the Superior Court for Middlesex County charging Baker with larceny and conspiracy to commit larceny on a number of occasions, all allegedly taking place after January 1, 1968. No pending indictment against Baker charges any criminal act prior to January 1, 1968.

5. A stipulation filed on November 24, 1971, by the District Attorney for the Northern District, and joined in by or in behalf of the Attorney General, is attached (exhibit B). It was supplemented by agreement in open court on that day (Tr. 1197-1198) that "larceny" should be included in the stipulation. We interpret this as inserting the words "or larceny" after the word "conspiracy" in both the first and second sentences of the stipulation.

6. With respect to conspiracies prior to January 1, 1965, and continuing thereafter, the stipulation of the District Attorney, joined in by or on behalf of the Attorney General, is applicable in accordance with its terms.

RULINGS OF LAW.

A. The passage of the time within which a criminal prosecution may be brought, under the applicable statute of limitations, precludes Baker from asserting the privilege against self-incrimination with respect to possibly criminal acts committed prior to November 29, 1965. *Moore* v. *Backus,* 78 F. 2d 571, 577 (7th Cir.). *United States* v. *Goodman,* 289 F. 2d 256, 262-263 (4th Cir.). McCormick, Evidence, § 135. Wigmore, Evidence (McNaughton rev.) § 2279 (c). See *Hale* v. *Henkel,* 201 U. S. 43, 67.

B. The burden of showing "that the statutory period of limitation has expired" rests upon the party objecting to the invocation of the privilege. See the *Goodman* case, *supra,* pp. 262-263. Special counsel have sustained that burden.

C. To the extent of any stipulation of immunity made by or in behalf of the Attorney General, or by a District Attorney with the approval of the Attorney General, and relied upon by Baker by giving testimony, applicable Massachusetts law requires this court to ensure that the public faith pledged to Baker is duly and fully kept and that the stipulation of immunity is enforced in good faith and fairly so as to constitute an effective grant of immunity in accordance with the terms of the stipulation. *Commonwealth* v. *Benton,* 356 Mass. 447.

D. From a careful consideration of all the circumstances of this inquiry, we are of opinion that it is clear that for Baker to answer questions put to him in direct or cross-examination with respect to events prior to January 1, 1965, will involve him in no risk of self-incrimination. See *Malloy* v. *Hogan,* 378 U. S. 1, 7-14; *Commonwealth* v. *Baker,* 348 Mass. 60, 62-63 (somewhat restricting *Sandrelli* v. *Commonwealth,* 342 Mass. 129, 132-141); *Murphy* v. *Commonwealth,* 354 Mass. 81, 83-84. Cf. *Gambale* v. *Commonwealth,* 355 Mass. 394, 396-398.

E. Baker's answers to Chief Justice McLaughlin on August 25, 1971, and to the State Police on August 5, 1971, do not constitute a general waiver for all purposes of Baker's privilege against self-incrimination. Special counsel have argued that, to the extent of the subject matter of the answers in fact given, such answers constitute a limited waiver of the privilege by Baker. We discuss this contention below in paragraph H.

F. The circumstance that such answers were in fact made, by Baker on August 5 and August 25, 1971, in the presence of Baker's counsel, is evidence that Baker and his counsel then regarded such questions and answers as having no substantial tendency to incriminate Baker or to provide any link in a chain of facts likely to incriminate Baker, and that they had no such tendency.

G. Relevant answers already given by Baker on August 5 and 25, 1971, could be introduced against him as admissions in any criminal proceeding in which he may be a defendant.

H. Because of the rulings above in paragraphs A through D, inclusive, it is unnecessary to decide whether and to what extent the answers given by Baker, in the presence of his counsel, without claiming any constitutional privilege, in previous interrogations constitute a waiver of such privilege. Were it necessary for this court now to rule on this issue, we would be disinclined to follow somewhat "mechanical" decisions elsewhere that waiver of the privilege against self-incrimination must occur in precisely the same proceeding in which the privilege is claimed. See e.g. *Re Neff*, 206 F. 2d 149, 151-153 (3d Cir.); *United States* v. *Miranti*, 253 F. 2d 135, 139-140 (2d Cir.). See also *People* v. *Walker*, 28 Ill. 585, 589-591; *State* v. *DeCola*, 33 N. J. 335, 345-349; *Snyder Appeal*, 398 Pa. 237, 244-246; Wigmore, Evidence (McNaughton rev.) §§ 2275-2276, esp. at pp. 470-472. Instead, we would be inclined to adopt as (1) in the public interest, (2) advancing the fair adminis-

tration of justice, and (3) less likely unfairly to obstruct justice and "sound law enforcement," a somewhat limited form of the rule laid down in *Ellis* v. *United States*, 416 F. 2d 791, 800-803 (D.C. Cir.) to the extent stated below. See McCormick, Evidence, § 130. See also Rule 37 (b) of the Uniform Rules of Evidence, 9A U. L. A. 621, which provides that the privilege is not available to a witness "if the judge finds that he ... while the holder of the privilege ... (b) without coercion and with knowledge of his privilege, made disclosure on any part of the matter or consented to such a disclosure made by any one." See also American Law Institute's Model Code of Evidence, Rule 231, p. 169 (see Rule 204, p. 135) and comments at pp. 343-345. We would be inclined to adopt the principle of the *Ellis* case at least to this extent, viz: Where a witness assisted and advised by counsel has testified in proceedings or investigations obviously directed to the subject matter of an inquiry or an issue later before a court, and where the prior testimony has been recorded by a competent stenographer or has been written out in the presence of the witness, the witness's privilege is to be deemed waived (a) at least to the extent of the subject matter of the questions which he has answered, (b) where the proceeding in which the privilege is invoked is a probable, logical, or natural continuation or outgrowth of the proceeding or inquiry in which prior testimony has been given by the witness.

ORDER.

Baker's general claim of privilege is denied with respect to any examination or cross-examination concerning events prior to January 1, 1965, subject to Baker's establishing by counsel that there is, as to any particular question, a significant risk of incrimination not hitherto brought to the court's attention. Baker may consult with, and be advised by, his counsel during his examination.

EXHIBIT A

August 20, 1971

Mr. Charles Baker
307 Cambridge Street
Boston, Massachusetts

Dear Mr. Baker:

In connection with the accusations which have been made by Michael Raymond involving the integrity of two justices of the Superior Court of this Commonwealth and in which your name has been prominently mentioned, I am desirous of personally interviewing you. I herewith designate Wednesday, August 25, 1971 at 10:00 a.m. at the office of the Chief Justice of the Superior Court at the courthouse in Boston. I will expect to take your evidence under oath. I will expect to have it transcribed. You may be represented by counsel of your choosing if you desire and you will be afforded the full opportunity to consult with him if you desire.

I request that you bring with you your diary for the years 1962 and 1964. I also request you to bring with you any papers, documents or files which you may have concerning Michael Raymond and your relationship with him whether these files are personal or business. If you have a file involving any of your correspondence or relationships with either Justice De Saulnier or Justice Brogna, I would like to have it with you and have it available. In addition to the foregoing, will you bring any of your records or documents concerning your business relationship with a New York bondsman named Al Newman.

I desire this appointment to be kept at the time and place designated because my schedule is very tight.

Sincerely yours,

Exhibit B

COMMONWEALTH'S STIPULATION

The Commonwealth will not prosecute any indictment returned against I. Charles Baker charging conspiracy *or larceny** prior to January 1, 1965.

In prosecuting any indictment charging conspiracy *or larceny** subsequent to January 1, 1965, the Commonwealth will not introduce as evidence any conduct or statements of I. Charles Baker engaged in or made prior to that date.

The Commonwealth will not introduce in any criminal proceeding any testimony given by I. Charles Baker before the Supreme Judicial Court.

For the Commonwealth,
John J. Droney
District Attorney
By, Richard A. Gargiulo
First Assistant District Attorney

[Assented to in behalf
of the Attorney General]

Reporter's Note. In open court on November 29, 1971, after the findings, rulings, and order were made, the above stipulation was amplified by adding at the end of the third sentence the following:

> or any facts learned as a consequence of such testimony, except in any prosecution for perjury based upon testimony by I. Charles Baker before the Supreme Judicial Court in this proceeding. The Commonwealth will not prosecute. I. Charles Baker for perjury, if any, committed in his sworn testimony before Chief Justice McLaughlin of the Superior Court on August 25, 1971.

Monroe L. Inker for Baker.

Edward B. Hanify & John M. Harrington, Jr., Special Counsel.

[* Underlined words in effect added by stipulation in open court November 24, 1971, Tr. 1197-1198]

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

IN THE MATTER OF EDWARD J. DESAULNIER, JR. & another.

Suffolk. — December 15, 1971.

Present: TAURO, C.J., CUTTER, REARDON, QUIRICO, & BRAUCHER, JJ.

Contempt. Constitutional Law, Trial by jury, Contempt proceeding.

Practice, Criminal, Jury trial, Contempt proceeding.

BY THE COURT. On November 29, 1971, the Supreme Judicial Court (this court) made certain findings and rulings of law regarding the refusal of the witness I. Charles Baker to answer questions put to him by special counsel, and denied Baker's attempt to assert a general claim of privilege in advance of being questioned. Special counsel then asked Baker a series of thirty-five questions (attached hereto as Exhibit A), each of which he declined to answer, "relying on the Fourth and Fifth Amendments to the Constitution of the United States." After each refusal to answer, the court ordered Baker to answer, eliciting only the same refusal. The court adjudged Baker to be in contempt for each refusal to answer, and reserved sentence. At the end of the day's proceedings, the court sentenced Baker to serve five months in the common jail for failure to answer each of questions 1, 3-13, and 22 (Group I). The twelve sentences were to be served concurrently. On each of the other contempts, the court deferred sentencing until December 1, 1971.

On December 1, 1971, prior to sentencing by this court, the United States Court of Appeals, First Circuit, affirmed the action of a Federal District Court judge who rejected Baker's request to be released on bail. The Court of Appeals stated that it saw "no substantial merit in [the] petitioner's attempt to challenge the Commonwealth's grant of immunity that would remove the danger of self-incrimination," and concluded that his "request for transactional immunity as to certain complaints brought against him for larceny committed in 1968 from his employer seems but a blatant attempt to horse-trade the Commonwealth." *Baker v. Eisenstadt*, F. 2d , , .*

On December 1, 1971, following argument by Baker's counsel, who made it clear to this court that he and his client were fully aware of the action and opinion of the United States Court of Appeals, First Circuit, this court stated that "if Mr. Baker wants to testify ... he is at liberty to do so as of now. We have not ended the hearing." Counsel for Baker indicated that his client still intended to stand on his claim of privilege. The court then, as to each of four specific groups of questions, imposed six months concurrent sentences to be served in the common jail because of Baker's refusal to answer each of the questions in that group. Each of the following questions fell into one of these four groups: 13, 14, 16, 17, 21, 23, 24, 25, 26, 28, 29, 30, 31, 32, 18, 19, 20, 27, 37, 39, 33, 34 and 35. The sentences imposed were to be served as follows:

GROUP II:

on each of the contempts on questions 13 and 14, concurrently with each other, and from and after the sentences for contempt imposed on November 29, 1971.

* Misc. No. 540, U.S. Ct. App. (1st Cir.) 1, 2, 3.

GROUP III:

on each of the contempts on questions 16, 17, 21, 23, 24, 25, 26, 28, 29, 30, 31 and 32, concurrently with each other, and from and after the sentences for contempt imposed for Group II.

GROUP IV:

on each of the contempts on questions 18, 19, 20, 27, 37 and 39, concurrently with each other, and from and after the sentences imposed for Group III.

GROUP V:

on each of the contempts on questions 33, 34 and 35, concurrently with each other, and from and after the sentences imposed for Group IV. (See Exhibit A.)

Counsel at that point in effect moved for a jury trial for his client, which this court denied. The court then ordered the hearing closed "unless otherwise ordered by this Court on its own motion or on motion of counsel."

1. Massachusetts law has long refused to distinguish rigidly between the civil and criminal aspects of contempt of court. *McCann* v. *Randall*, 147 Mass. 81, 90. *New York Cent. R.R.* v. *Ayer*, 253 Mass. 122, 129. *Root* v. *MacDonald*, 260 Mass. 344, 357-358. *Stow* v. *Marinelli*, 352 Mass. 738, 745. Reed, Equity Pleading & Practice, § 971, 292-293. A sentence for contempt in Massachusetts may be "partly remedial and partly punitive, partaking both of civil and criminal features." *Root* v. *MacDonald*, *supra*, 363-365. *Stow* v. *Marinelli*, *supra*, 745. Nothing, however, precludes a Massachusetts court from giving an unconditional sentence for contempt which is largely or entirely "for the purpose of inflicting punishment upon one who has willfully disobeyed a lawful order of the court," *McCann* v. *Randall*, 147 Mass. 81, 90, where this is necessary to vindicate the authority of the court and to deter other like derelictions, *Root* v. *MacDonald*, *supra*, *Stow* v. *Marinelli*, *supra*, 745. *Ex parte Grossman*, 267 U.S. 87, 111, or where the acts of

the contemnor are an affront to the law tending to obstruct or degrade the administration of justice. *Cartwright's Case,* 114 Mass. 230, 238. *Godard* v. *Babson-Dow Mfg. Co.,* 319 Mass. 345, 347. To the extent that such a contempt sentence is for purely punitive purposes and is absolute, not conditional, in nature it constitutes a sentence for criminal contempt. See *Hurley* v. *Commonwealth,* 188 Mass. 443, 447; *Blankenburg* v. *Commonwealth,* 260 Mass. 369, 372; *Opinion of the Justices,* 301 Mass. 615, 618-619; *Corcoran* v. *Commonwealth,* 335 Mass. 29, 35. This is in accord with the Federal law. See *Shillitani* v. *United States,* 384 U.S. 264, 269-370.

The sentences imposed on Baker for contempt of court were unconditional in terms. They were for the purpose of vindicating the authority of the court and punishing the contemnor for obstructing and degrading the administration of justice in an extraordinary proceeding of utmost importance to the State judicial system. His sentences were imposed, at least in large part, for specified criminal contempts of court. He does not have "the keys of... [his] prison in... [his] own pockets." See *Shillitani* v. *United States, supra,* 368; *In re Nevitt,* 117 Fed. 448, 461 (8th Cir.). We are not now required to discuss the authority of this court, in its discretion, with respect to the sentences already imposed in the event that Baker makes full disclosure.

2. In a proceeding for contempt, there is no right to a trial by jury under Massachusetts State law, even when the proceeding's object and result are wholly punitive. *Root* v. *MacDonald,* 260 Mass. 344, 365. *Dolan* v. *Commonwealth,* 304 Mass. 325, 340. *Commonwealth* v. *McHugh,* 326 Mass. 249, 277. See *Cartwright's Case,* 114 Mass. 230, 238; *Walton Lunch Co.* v. *Kearney,* 236 Mass. 310, 317; *Blankenburg* v. *Commonwealth,* 260 Mass. 369, 373-374; *Opinion of the Justices,* 349 Mass. 786, 793. General Laws

c. 220, § 13A, which provides for a jury trial in contempt proceedings growing out of labor disputes, specifically excludes any "contempts committed in the presence of the court."

3. In *United States* v. *Barnett*, 376 U.S. 681, 692, Mr. Justice Clark, speaking for the court, said, "It has always been the law of the land, both state and federal, that the courts — except where specifically precluded by statute — have the power to proceed summarily in contempt matters." This case ruled that there was no general right to a jury trial in criminal contempt proceedings, pp. 692-700, although some members of the court were of the view that the Constitution limited the punishment which could be imposed where the contempt was tried without a jury. Pp. 694-695, note 12. The general rule has been reexamined in light of the decision of the Supreme Court of the United States that the constitutional guaranty to jury trial extended to State courts in serious criminal cases. *Duncan* v. *Louisiana*, 391 U.S. 145, 149-150, 159.

In *Bloom* v. *Illinois*, 391 U.S. 194, 195, 210-211, the Supreme Court held that where sentence by a State court for a single out-of-court criminal contempt reached twenty-four months imprisonment there was a right to a trial by jury. There was a short, but compelling, dissent by Mr. Justice Harlan, joined by Mr. Justice Stewart. P. 215.

We are, of course, bound by the reexamination in the *Bloom* decision of the general rule stated in the *Barnett* case. The case before us, however, is very different, in both the letter and the spirit of the law involved, from that in the *Bloom* case. Baker was guilty of a series of distinct contempts against the authority of this court, consisting of separate refusals to obey different orders of this court to answer questions. These the court separated into groups of questions, each question in each group relating to the same general subject as the other questions in that group. The

refusal to answer the questions in no one of these groups was made the basis of a sentence of more than six months. The situation is entirely different from the single contempt in the *Bloom* case, where the contemnor wilfully sought to have admited to probate a will falsely prepared and executed after the death of the putative testator, an act which was held to deserve a sentence of twenty-four months imprisonment. *Bloom* v. *Illinois, supra,* 195.

The *Bloom* case specifically declined to carry over the jury trial requirement to "petty" offences. *Dyke* v. *Taylor Implement Mfg. Co. Inc.,* 391 U.S. 216, 219-220. See *Cheff* v. *Schnackenberg,* 384 U.S. 373, 380; *Baldwin* v. *New York,* 399 U.S. 66, 68-69. Mr. Justice White, speaking for the court in the *Bloom* case, said, "By deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury. . . . Our analysis of *Barnett, supra,* and *Cheff* v. *Schnackenberg,* 384 U.S. 373, makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in *Cheff,* when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense." *Bloom* v. *Illinois, supra,* 210-211. *Frank* v. *United States,* 395 U.S. 147, 149. None of Baker's offences was serious enough to demand an actual penalty of more than six months. These constitute petty offences, *Dyke* v. *Taylor Implement Mfg. Co. Inc., supra,* 219-220, *Baldwin* v. *New York, supra,* 68-69, which do not demand a jury trial as a matter of constitutional right in either Federal or State courts.

There is also another distinction, particularly important with regard to jury trial, between the kind of contempt involved in the *Bloom* case and that before us. In the *Bloom*

case, the essence of the criminal contempt took place outside of the court room. The crucial question was not whether the petitioner had wilfully petitioned to admit to probate the will in question, for of that fact there could have been little doubt, but whether the will had been falsely prepared and executed after the death of the putative testator. *Bloom* v. *Illinois, supra,* 195, 210-211. Remanding for a trial by jury in this case, involving an alleged event which occurred largely out of court and off the record, was a reasonable step for the *Bloom* court and one which protected a right which could have some genuine content and value. *Bloom* v. *Illinois, supra,* 211. Such a right might also have some value if the contempt involved a court-room disorder where the facts of what occurred were in question and where the personality of the judge was sufficiently involved as to impair his objectivity as to what actually took place. Compare the facts of *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 455-463.

In the instant case, however, the contempts were refusals, made in open court before this court during a proceeding of record, to obey the lawful orders of the court to answer questions. There is no dispute of fact as to whether the individual refusals took place. The in-court proceedings were entirely orderly.[1] The contemnor was not punished for any out-of-court contempts.

There have been no Federal cases which have decided that a right to jury trial exists where the contempt punished occurred in an orderly court room in the absence of any genuine dispute as to the facts. Even in the *Mayberry*

[1] A dictum in the *Bloom* case refused to make an exception to the jury requirement for "disorders in the courtroom," largely because of the adequacy of petty sentences to deal with such situations. *Bloom* v. *Illinois, supra,* 210. This dictum did not consider contempts which entailed no questions of fact and for which petty offence sentences might be inadequate. In the present case, however, petty offence sentences, of the kind recommended by the *Bloom* court for in-court contempts, were adequate. See *Bloom* v. *Illinois, supra,* 209-210.

case, where sentences for in-court contempt of a disorderly nature were given by a State judge and amounted to not less than one year for each offence and totalled eleven to twenty-two years, *Mayberry* v. *Pennsylvania, supra,* 455, the Supreme Court did not discuss a jury trial requirement, but vacated and remanded for a public trial before another judge on grounds relating to the possibility of personal involvement by the judge. *Mayberry* v. *Pennsylvania, supra,* 466.[2]

Baker has not argued or even suggested the existence of issues of fact relating to the offence with which he is charged. Indeed it would be most difficult, in the circumstances of this case, to conceive any factual questions which require or warrant their submission to a jury for determination. A jury trial in these circumstances would be an exercise in futility. See *Leigh* v. *Rule,* 331 Mass. 664, 669.

To fetter the ability of State courts to protect themselves against contempt in proceedings, such as this one, of the utmost importance to the integrity of the State judicial system itself in the name of a guaranty which, if granted, would be practically void of any meaningful value must, in the words of Mr. Justice Harlan, be "in derogation of the central premise of our Constitution." *Bloom* v. *Illinois, supra,* 215. Baker was not deprived of a Federal right to a jury trial.

4. We next consider whether Baker committed one or a number of contempts by his repeated refusals to answer the questions put to him by special counsel. There are no reported Massachusetts cases dealing with this issue to which we can look for guidance. Two related principles have been established in other jurisdictions:

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[2] There was a concurring opinion by Mr. Justice Harlan solely on the basis that the unprecedented long sentence "infected" the contempt convictions. This opinion suggests another basis for constitutional review of contempt sentences far more meaningful, in instances such as the case at hand, than a jury trial guaranty.

1. Only one *penalty* for contempt can be imposed when separate questions are designed to establish but a single fact, or relate to but a single subject of inquiry. *United States* v. *Orman,* 207 F. 2d 148, 160 (3d Cir. 1953) and cases cited;
2. When several questions cover more than a single subject of inquiry, a single contempt is committed by refusal to answer where every question falls within the area of refusal established by the witness when asked the first question. *Yates* v. *United States,* 355 U.S. 66, 71, 73 (witness refused to identify anyone as a Communist). *People* v. *Riela,* 7 N.Y. 2d 571, 576-578 (witness refused to answer any questions concerning the so called "Apalachian meeting").[3]

With respect to (1), each of Baker's refusals to answer after being ordered to do so by the court constituted a separate contempt. No question put by special counsel was repetitive. Each sought to elicit new facts. For the purpose of sentencing, however, this court divided the questions into broader subjects of inquiry. Group I contains twelve questions, each dealing in some way with Baker's involvements with Raymond in the fall of 1961 and the spring of 1962, particularly with respect to the court proceedings in the Superior Court in Middlesex County (Cambridge) and the First District Court of Northern Middlesex (Ayer). The sentences imposed on November 29, 1971, for the contempts within this group were concurrent. Our judgment of the proper penalty was not influenced by the fact that we found Baker guilty of twelve contemptuous acts, but by our feeling that a refusal to speak on this particular, definable subject matter merited five months in

[3] The *Orman* and the *Yates* cases laid down a rule applicable to the Federal courts only, and, like the New York case, did not purport to establish a constitutional rule binding on all State courts.

the common jail. Compare *Yates* v. *United States,* 355 U.S. 66, 71, 75. The penalty would have been the same whether we viewed this as one contempt or twelve. It was not possible to categorize, however, until special counsel had exhausted his examination. We thus adopted the procedure of adjudging the witness in contempt for each separate refusal to answer, and reserving sentence until examination had been completed.

We postponed until December 1, 1971, sentence on the contempts (other than Group I) for which no sentence was imposed on November 29, for two principal reasons: (1) to afford Baker an opportunity to reconsider his position with respect to such other questions, and (2) to examine such questions and group them appropriately for sentencing purposes.

With respect to the concurrent six month sentences within Groups II-V, we felt that consecutive, or "from and after" sentences should be imposed for failure to answer questions in each of the five groups. Baker had every opportunity to testify after *Baker* v. *Eisenstadt, supra,* was handed down and before the hearing was terminated, and the fact that he did not do so was a factor in our consideration. See *Second Additional Grand Jury* v. *Cirillo,* 12 N.Y. 2d 206, 210-211; *Vario* v. *County Court, Nassau County,* 32 App. Div. 2d (N.Y.) 1038.

Groups II-V were divided according to subject matter in the following way:

Group II. Baker's involvements with Raymond in June, 1962.

Group III: Baker's involvements with Raymond in September, 1962, particularly with respect to what transpired on September 27 and 28.

Group IV: Baker's alleged relationship with Judges DeSaulnier and Brogna in September, 1962.

Group V: Baker's alleged meeting with Raymond and Judge DeSaulnier at a public place known as the Darbury Room on September 28, 1962.

With respect to (2), we point out that Baker never did "... [carve] out an area of refusal" as the witnesses did in cases such as *Yates* v. *United States,* 355 U.S. 66, 71, 73, and *People* v. *Riela,* 7 N.Y. 2d 571, 576-578. It is significant that Baker declined to answer when special counsel asked him: "Are you going to refuse to answer any and all questions I put to you, which questions I represent to you will be confined by their terms to the years 1961 and 1962?"[4] In the *Riela* case, the witness refused to answer any questions before a grand jury pertaining to the "Apalachian meeting." The prosecutor continued to inquire, and the defendant was found guilty of seventeen counts. In arguing to sustain the convictions on all seventeen, the State relied on the earlier case of *People* v. *Saperstein,* 2 N.Y. 2d 210, wherein the Court of Appeals upheld five convictions of contempt because of a defendant's refusals to "state definitely" who were the participants in five separate telephone conversations. In distinguishing the *Saperstein* case, the *Riela* court stated: "In the present case, the District Attorney necessarily knew, ahead of time, that the claim of privilege once asserted would be repeated, while in *Saperstein* the prosecutor had to continue questioning to find the limits of the defendant's refusal to answer. In *Saperstein,* in other words, the District Attorney was engaged in bona fide interrogation, in the sense that he could reasonably

[4] Any testimony which could be argued to have carved out such an area of refusal occurred prior to the stipulation (attached hereto as Exhibit B) and hence is irrelevant.

have supposed that the witness would answer each of the questions asked, while here the District Attorney repeated 17 questions knowing full well from Riela's response to his first query that he would not answer any of them." P. 578. We are careful to point out, however, that we need not decide the question whether a defendant can, by prior announcement, limit his potential number of contempt citations to one. We prefer to await the arrival of such an issue in the normal course of litigation. Suffice it to say that Baker made no effort so to define his area of refusal, and thus cannot come within the possible protection of principle (2).

We recognize that our decision to impose consecutive sentences may be subject to constitutional limits. We consciously attempted to avoid imposing sentences so long in the aggregate as conceivably to violate constitutional limitations. See *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 469 (Harlan, J. concurring); *Second Additional Grand Jury* v. *Cirillo*, 12 N.Y. 2d 206. In this respect the aggregate sentences imposed (with respect to the several groups of questions each relating to a different period of time or to a different group of incidents) are not excessive. The punishment imposed is fully warranted in view of the great importance of this proceeding to the integrity of the judicial system of the Commonwealth, and in view of the seriously obstructive and contumacious action of Baker. He was offered extraordinarily thorough protection from prosecution by the enforceable stipulations of the Commonwealth in addition to the protection afforded by the statute of limitations.

EXHIBIT A

	TRANS. PAGE	QUES. NO.	SUBJECT MATTER
GROUP I. DISPOSED OF ON 11-29-71	1226	1	Q. Now, directing your attention, Mr. Baker, to the year 1961, did you at some time in the fall of that year meet a man named Michael Raymond?
	1229	3	Q. Did there come a time in the fall of 1961 when you wrote a surety bail bond for Michael Raymond with respect to an indictment in the Middlesex Superior Court?
	1229	4	Q. And Mr. Baker, did you in 1961 receive any payment for any bail bond which you wrote or arranged for writing for Michael Raymond?
	1230	5	Q. Did you, in 1962, in May or June of that year, have any communication with Michael Raymond?
	1231	6	Q. Mr. Baker, on May 29th, 1962, did Mr. Michael Raymond — did you say to Mr. Michael Raymond in your office, "You have finally come to the right place," or words in substance similar thereto?
	1232	7	Q. [By Mr. Harrington] At any time in 1962, Mr. Baker, did you receive from Michael Raymond any money?
	1232	8	Q. Did you in May or June of 1962, Mr. Baker, tell Mr. Raymond that for a payment of $10,000 you would arrange a continuance of a case then pending against him in the Middlesex Superior Court?
	1233	9	Q. Mr. Baker, in June of 1962, did you provide a surety bail bond for Mr. Michael Raymond in the sum of $20,000 in the Ayer District Court, otherwise known as the First District Court of Northern Middlesex?

	Trans. Page	Ques. No.	Subject Matter
Group I.	1233	10	Q. Mr. Baker, did you in June of 1962 receive as payment of a premium for a bail bond of Michael Raymond in the First District Court of Northern Middlesex the sum of $1,000 in cash?
	1234	11	Q. Mr. Baker, were you in June, 1962, acquainted with a lawyer practicing in the City of Worcester, Massachusetts, named "Richard G. Crotty?"
	1235	12	Q. Did you in June, 1962, Mr. Baker, mention the name of Richard G. Crotty to Michael Raymond?
	1242	22	Q. Did you, Mr. Baker, between May and September of 1962 have any part in Mr. Raymond securing the services of Richard G. Crotty of Worcester as an attorney?
Group II. Disposed of on 12-1-71	1235	13	Q. Did you in June of 1962, Mr. Baker, own an automobile of the type known as a Thunderbird?
	1236	14	Q. Mr. Baker, in June of 1962, did you drive Mr. Michael Raymond to Worcester, Massachusetts, to the office of Richard G. Crotty?
Group III. Disposed of on 12-1-71	1238	16	Q. In September of 1962, did you have any telephone communication whatsoever with Michael Raymond?
	1238	17	Q. Between June 1962 and September, 1962, had Mr. Michael Raymond of New York been in your office in Boston at any time when you were there?
	1241	21	Q. At any time between May and September of 1962, Mr. Baker, had you had any discussion whatsoever with Mr. Michael Raymond about the

	Trans. Page	Ques. No.	Subject Matter
Group III.			
			criminal case in Middlesex County in which you had arranged to provide a surety bail bond, that case being No. 57940?
DISPOSED OF ON 12-1-71	1243	23	Q. Did you in September of 1962 telephone Mr. Raymond in New York and tell him, in substance, that he had to come to Boston quickly, that a judge had died, and it would be important to dispose of his case during the month of September?
	1243	24	Q. Did you at any time in the month of September, 1962, receive any payment by means of currency, check or otherwise from Mr. Michael Raymond?
	1244	25	Q. Mr. Baker, did you go to Middlesex Superior Courthouse on September 27, 1962?
	1245	26	Q. Mr. Baker, on September 27, 1962, did you go to the Middlesex County Courthouse in the company of Mr. Michael Raymond?
	1246	28	Q. Did you on September 27, 1962, have any conversation with Mr. Michael Raymond?
	1247	29	Q. Did you have any conversation on September 27, 1962, with Mr. Raymond with respect to the continuance of either of the cases then pending against him — him, Mr. Raymond — being No. 57940 and No. 65677?
	1249	30	Q. Directing your attention to September 28, 1962, Mr. Baker, did Mr. Raymond come to your office before court on that day?

	Trans. Page	Ques. No.	Subject Matter
Group III.			
	1249	31	Q. Directing your attention to September 28th, 1962, did you accompany Mr. Michael Raymond to the Middlesex Superior Court on that day?
Disposed of on 12-1-71	1250	32	Q. Were you in the company of Mr. Michael Raymond on September 28, following the close of court in the Middlesex Superior Court?
Group IV.			
Disposed of on 12-1-71	1239	18	Q. In September of 1962, Mr. Baker, did you know Mr. Justice DeSaulnier of the Superior Court of Massachusetts?
	1240	19	Q. As of September of 1962, Mr. Baker, had you ever met Mr. Justice DeSaulnier?
	1240	20	Q. As of September, 1962, had you ever met Mr. Justice Brogna of the Massachusetts Superior Court?
	1245	27	Q. Mr. Baker, did you on September 27, 1962, telephone Mr. Justice DeSaulnier from the Middlesex County Courthouse?
	1254	37	Q. At any time in 1962 Mr. Baker, did you communicate with Mr. Justice DeSaulnier with respect to the conduct or disposition of the case or cases against Mr. Michael Raymond then pending in the Middlesex Superior Court?
	1255	39	Q. In 1962, Mr. Baker, did you communicate with Mr. Justice Brogna in connection with the conduct or disposition of the cases then in 1962 pending against Michael Raymond in the Middlesex Superior Court?

	Trans. Page	Ques. No.	Subject Matter
Group V. disposed of on 12-1-71	1251	33	Q. On September 28, 1962, Mr. Baker, had you ever been in the Darbury Room, a bar and restaurant in Boston on Dartmouth Street?
Group V. disposed of on 12-1-71	1251	34	Q. On September 28, 1962, Mr. Baker, did you go to the Darbury Room in Boston, Mass., in the company of Michael Raymond?
	1252	35	Q. On September 28, 1962, did you meet Mr. Justice DeSaulnier in the Darbury Room in Boston?

Exhibit B

COMMONWEALTH'S STIPULATION

The Commonwealth will not prosecute any indictment returned against I. Charles Baker charging conspiracy *or larceny** prior to January 1, 1965.

In prosecuting any indictment charging conspiracy *or larceny** subsequent to January 1, 1965, the Commonwealth will not introduce as evidence any conduct or statements of I. Charles Baker engaged in or made prior to that date.

The Commonwealth will not introduce in any criminal proceeding any testimony given by I. Charles Baker before the Supreme Judicial Court.

For the Commonwealth,
John J. Droney
District Attorney
By, Richard A. Gargiulo
First Assistant District Attorney

[Assented to in behalf
of the Attorney General]

[* Underlined words in effect added by stipulation in open court November 24, 1971, Tr. 1197-1198]

Reporter's Note. In open court on November 29, 1971, after the findings, rulings, and order were made, the above stipulation was amplified by adding at the end of the sentence the following:

> or any facts learned as a consequence of such testimony, except in any prosecution for perjury based upon testimony by I. Charles Baker before the Supreme Judicial Court in this proceeding. The Commonwealth will not prosecute I. Charles Baker for perjury, if any, committed in his sworn testimony before Chief Justice McLaughlin of the Superior Court on August 25, 1971.

Monroe L. Inker for Baker.

Edward B. Hanify & John M. Harrington, Jr., Special Counsel.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.C. No. 71-153-F

I. CHARLES BAKER

v.

THOMAS S. EISENSTADT,
Sheriff of Suffolk County

OPINION

December 27, 1971

FORD, D.J.

Petitioner in this habeas corpus petition is at present in confinement under sentence imposed for contempts committed in the presence of five sitting Justices of the Massachusetts Supreme Judicial Court during the course of a hearing by that Court on an information alleging misconduct on the part of two Justices of the Massachusetts Superior Court. In brief, the proceeding involved an inquiry into allegations of one Michael Raymond that in 1962 Raymond had paid a substantial amount of money to petitioner Baker to be used to arrange, through one of the accused Justices, for a favorable disposition by the other accused Justice of a criminal case in the Middlesex Superior Court in which Raymond was a defendant.

Baker was subpoenaed to appear and testify in the hearing before the Supreme Judicial Court. He moved through counsel that he not be required to testify because of the possibility of self-incrimination. In the course of hearings on this motion, a stipulation was offered by the District Attorney for the Northern District, assented to by the Attorney General of Massachusetts, which, as finally amended, reads:

"The Commonwealth will not prosecute any indictment returned against I. Charles Baker charging conspiracy or larceny prior to January 1, 1965.

"In prosecuting any indictment charging conspiracy or larceny subsequent to January 1, 1965, the Commonwealth will not introduce as evidence any conduct or statements of I. Charles Baker engaged in or made prior to that date.

"The Commonwealth will not introduce in any criminal proceeding any testimony given by I. Charles Baker before the Supreme Judicial Court or any facts learned as a consequence of such testimony, except in any prosecution for perjury based upon the testimony by I. Charles Baker before the Supreme Judicial Court in this proceeding. The Commonwealth will not prosecute I. Charles Baker for perjury, if any, committed in his sworn testimony before Chief Justice McLaughlin of the Superior Court on August 25, 1971."

The Supreme Judicial Court, after hearing, made findings of fact and rulings of law and entered an order providing that:

"Baker's general claim of privilege is denied with respect to any examination or cross-examination concerning events prior to January 1, 1965, subject to Baker's establishing by counsel that there is, as to any particular question, a significant risk of incrimination not hitherto brought to the court's attention. Baker may consult with, and be advised by, his counsel during his examination."

On November 29, 1971, Baker was called to testify. He was asked a total of forty-six (46) questions, forty-three (43) by special counsel appointed to prosecute the information and three (3) by counsel for the two accused Justices. Following the asking of each question, the following in substance took place:

"A. Relying on the Fourth and Fifth Amendments to the Constitution of the United States, I respectfully decline to answer.

Chief Justice Tauro: The witness is ordered to answer the question.

The Clerk: Mr. Witness, the Court orders that you answer the question.

The Witness: Relying on the Fourth and Fifth Amendments to the Constitution of the United States, I respectfully decline to answer.

Chief Justice Tauro: The witness is adjudged to be in contempt.

The Clerk: Failing to comply with the lawful order of the Court, the Court adjudges you to be in contempt.

Chief Justice Tauro: Sentence is reserved. Continue."

Later on that same day, the court, after hearing counsel for Baker on the question of disposition, imposed a sentence of five (5) months for contempt of court for failure to answer Question No. 1, with concurrent sentences of five (5) months for failure to answer Questions 3 through 12, and Question 22. Disposition of the contempts as to the other questions was continued until December 1, 1971, when the court imposed a series of six-month sentences for contempts as to the remaining questions. These questions were divided into four (4) groups according to the particular subject matters to which they related, and sentences as to the questions in each group were made concurrent with each other. As a result, the total time to be served by petitioner under all the sentences imposed is twenty-nine (29) months.

Petitioner first of all contends that the immunity granted to him in this proceeding was not extensive enough to justify the court to order him to testify in the face of his claim of the privilege against self-incrimination under the Fifth Amendment. There is little merit to this contention.

Petitioner's claim to privilege was denied only as to questioning as to events prior to January 1, 1965. The questions which he refused to answer all dealt with events occurring prior to that date. The stipulation provided not only that his testimony and facts learned as a consequence of it could not be used against him, but even that any conduct or statements of his made before January 1, 1965, would not be used in evidence against him in prosecutions charging larceny or conspiracy subsequent to that date. It went further to provide that he would not be prosecuted on any indictment charging conspiracy or larceny prior to 1965, as to which, in any event, the statute of limitations would seem to bar prosecution. Petitioner has not indicated how answers to the questions put to him could have in any way exposed him to the possibility of self-incrimination as to any matter not covered by the scope of the grant of immunity. We are, of course, concerned here only with the questions he actually refused to answer, not with the possible effect of other questions he might have been asked. In any event, the order of the court, while generally denying his claim of privilege, expressly left open the right to make a showing as to the risk of incrimination involved in any particular question.

Petitioner next advances the argument that the record of the proceedings before the court creates an ambiguity as to whether the court intended to impose a sentence for civil or for criminal contempt. He argues that the sentence should be considered as one for civil contempt, imposed solely to coerce him to testify and that since the hearing before the Supreme Judicial Court has been closed, he should now be released, *Shillitani* v. *United States*, 384 U.S. 364. However, on December 15, 1971, subsequent to petitioner's argument to this Court, the Supreme Judicial Court has handed down an opinion which removes the ambiguity, if any such ever existed. In the light of that opinion, it is

now clear that the sentences imposed were intended to be for criminal contempt and were unconditional sentences for definite terms imposed primarily for the purpose of punishment.

Regarding the contempt as criminal, petitioner argues that his constitutional rights have been violated because he was denied notice and hearing, because he was denied a jury trial, and because the imposition of several distinct sentences for contempt constituted double jeopardy and inflicted on him cruel and unusual punishment.

The claim for lack of notice and hearing does not require extended discussion. A reading of that part of the record of the hearing pertaining to Baker can leave no doubt that at every stage of the proceeding up to the final disposition, he was given every opportunity to be heard, and that he acted with full awareness of what was required of him by the court and disobeyed its orders with full knowledge that he was thereby rendering himself liable to punishment for contempt.

The right to jury trial does not extend to all cases of criminal contempt. As with other criminal offenses, the right to jury trial does not extend to cases which constitute only petty offenses. (A petty offense under Federal law is one for which the penalty does not exceed six months' imprisonment, a fine of five hundred dollars [$500.00], or both. 18 U.S.C. §1.) Where, as in the case of contempt, no maximum penalty has been fixed by statute, the penalty actually imposed is the best evidence of the seriousness of the offense in the eyes of the court for the purpose of determining whether such contempt is a petty offense. *Bloom* v. *Illinois*, 391 U.S. 194; *Cheff* v. *Schnackenberg*, 384 U.S. 373. Moreover, the acts of contempt here were clearly within the category of contempts committed in open court, as to which summary punishment has traditionally been justified. There is no factual issue involved for a jury to decide. Hence, it must be concluded that, at least as to

each of the contempts considered separately, there was no Federal constitutional right to a jury trial.

The remaining contentions of petitioner are based on the action of the court in providing that certain of the contempt sentences imposed are to run consecutively, so that, in all, the petitioner has been sentenced to serve twenty-nine (29) months' imprisonment. Petitioner contends that what the court did here was to allow a long series of questions to be put to him and used his repeated refusals to answer as a basis for fragmenting what was essentially a single contempt into multiple contempts. As a result, he contends, the court rendered illusory his right to a jury trial for an offense considered more serious than a petty offense, in effect violated his privilege against double jeopardy by repeatedly punishing him for the same offense, and imposed a cruel and unusual punishment.

The essential question is whether the court was constitutionally required to consider Baker's conduct as constituting only a single contempt, or whether it was constitutionally entitled to find that there were, for purposes of punishment, several separate contempts.

This was not a case in which the interrogating counsel repeatedly asked questions which he was certain the witness would not answer merely for the purpose of multiplying contempts. While there was an indication that petitioner did not wish to testify at all, he never made it clear that when categorically ordered to do so by the court, he would refuse to answer any and all questions. This was not a case such as *United States* v. *Costello,* 198 F 2d 200, where witness at the outset made it clear he would not answer any questions at all, or *Yates* v. *United States,* 355 U.S. 66, where witness indicated a definite subject area as to which she would answer no questions. Here, Baker confined himself to a refusal to answer each question as it was put to him. He even refused to answer questions specifically inquiring whether or not he would refuse to answer all questions put to him.

The record shows no evidence of a needless piling up of questions. The questions asked were not cumulative. Each was a pertinent inquiry into a distinct and separate phase of the matter under investigation. The total number of questions seems in no way excessive. In the light of the evidence from other witnesses as to the extent of Baker's alleged connections with the activities under investigation, the questions were no more numerous than could be considered reasonably necessary to cover the relevant field of inquiry.

While the court found Baker separately in contempt as to each of his forty-six (46) failures to answer, it did not impose, as it theoretically might have done, forty-six (46) separate sentences to be served consecutively. Instead, for purposes of imposing consecutive sentences, it divided the separate contempts into five (5) groups, the sentences in each group relating to one particular phase of his activities in connection with this case as to which Baker was questioned. Each of these groups of questions differed from the others as to time and place and as to the other persons alleged to have been involved with Baker.

In the circumstances of the case, such a grouping was based on substantial and rationally supporting grounds. It appears eminently fair and reasonable. Considering the public importance of the proceeding, and the extent to which the court might justifiably have considered Baker had, by his refusals to answer, impeded its efforts to arrive at all the facts, the total of the sentences imposed was not excessive—certainly not to the degree where it would approach an infringement on petitioner's constitutional rights.

The conclusion is that petitioner has failed to show that the action of the state court violated any of his Federal constitutional rights.

The application for writ of habeas corpus is denied, and the complaint is dismissed.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 71-1399.

I. CHARLES BAKER,

PETITIONER, APPELLANT,

v.

THOMAS S. EISENSTADT,

SHERIFF OF SUFFOLK COUNTY,

RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Kevin M. Keating, with whom *Monroe L. Inker*, *Crane, Inker & Oteri*, and *Charlotte Anne Perretta*, were on brief, for appellant.

Walter H. Mayo, III, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *James P. Kiernan*, *Terence P. O'Malley*, Assistant Attorneys General, and *Danielle deBenedictis*, Deputy Assistant Attorney General, were on brief, for appellee.

February 23, 1972.

COFFIN, *Circuit Judge*. Appellant, now in confinement under sentences for contempt of the Massachusetts Supreme Judicial Court, appeals the denial of his petition for habeas corpus and the dismissal of his complaint by the district court.

I. THE FACTS

During the summer and fall of 1971, an investigation into the alleged misconduct of two judges of the Massachusetts

Superior Court took place, part of which involved appellant's being interviewed, first, by Commonwealth investigators, and, second, by the Chief Justice of the Superior Court. Subsequently, the Supreme Judicial Court (hereinafter "Court") appointed special counsel who on October 4, 1971, presented an information[1] based on statements made by one Michael Raymond and others. The charges were summarized by the Court in its final opinion disposing of the matter as follows:

> "In essence, Raymond stated that in 1962 he made payments to I. Charles Baker [appellant], a surety bail bondsman, upon Baker's representation that he could insure a favorable judicial result in Raymond's cases. Baker further stated, according to Raymond, that the arrangement for disposition of his matters was to be made through Judge DeSaulnier. From June of 1962 until the final disposition, Raymond was represented by Mr. Richard G. Crotty of Worcester, who was an intimate social friend of Judge DeSaulnier. Raymond's cases came before Judge Vincent R. Brogna in September, 1962. After several continuances, and after a partial restitution agreement had been reached with the victims of Raymond's larcenies, Raymond was given a suspended sentence and placed on probation. Following his final court appearance on September 28, Raymond and Baker met Judge DeSaulnier in a public place known as the Darbury Room. Raymond's matter was referred to, and Judge DeSaulnier expressed his pleasure in 'doing business' with Raymond." *In the Matter of Edward J. DeSaulnier, Jr. & another*, 1972 Mass. Adv. Sh. 65, 66.

On October 5, 1971, the day after the information was presented charging judicial misconduct, appellant and his

[1] While two informations were filed, we are concerned here with only one.

brother, both licensed bail bondsmen, were indicted by the Middlesex County Grand Jury for larceny, the counts covering the period from November 20, 1967, to July 31, 1971, and for conspiracy to commit larceny, beginning in 1968.

Appellant, subpoenaed to testify at a hearing to be held on November 15, 1971, inquiring into the charges of judicial misconduct, moved to quash the subpoena, asserting that his Fourth, Fifth, and Fourteenth Amendment rights would be violated were he to be compelled to testify. In the course of considerable subsequent negotiation, amendments to the Commonwealth's original grant of immunity were prepared in an attempt to satisfy appellant's Fifth Amendment claim. A written stipulation, offered by the Middlesex County District Attorney, and assented to by the Massachusetts Attorney General, reached its final form on November 29, as reproduced in the margin.[2] At the same time the Court issued its "Findings and Rulings," 1971 Mass. Adv. Sh. 1689, denying appellant's claim of privilege "with respect to any examination or cross-examination concerning events prior to January 1, 1965, subject to [appellant's] establishing by counsel that there is, as to any particular question, a significant risk of incrimination not hitherto brought to the court's attention" *Id.* at 1693.

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[2] "The Commonwealth will not prosecute any indictment returned against I. Charles Baker charging conspiracy or larceny prior to January 1, 1965.

"In prosecuting any indictment charging conspiracy or larceny subsequent to January 1, 1965, the Commonwealth will not introduce as evidence any conduct or statements of I. Charles Baker engaged in or made prior to that date.

"The Commonwealth will not introduce in any criminal proceeding any testimony given by I. Charles Baker before the Supreme Judicial Court or any facts learned as a consequence of such testimony, except in any prosecution for perjury based upon the testimony by I. Charles Baker before the Supreme Judicial Court in this proceeding. The Commonwealth will not prosecute I. Charles Baker for perjury, if any, committed in his sworn testimony before Chief Justice McLaughlin of the Superior Court on August 25, 1971" 1971 Mass. Adv. Sh. 1965 (italics ommitted).

Appellant, as will be more fully detailed later, refused to testify upon being recalled to the stand the same day. Forty-five substantive questions were asked, appellant refusing to answer each and being held in contempt for forty-three refusals. He was sentenced to five months imprisonment for each of twelve refusals, the sentences to run concurrently, with disposition reserved as to the remaining contempts.

Appellant immediately sought habeas corpus relief in the district court and also admission to bail. Upon denial of the latter motion, he appealed to us. Being then persuaded that the Commonwealth's stipulation met even the rigorous standard of transactional immunity in all material respects, we saw no more than speculative merit in appellant's objections and affirmed the denial of bail on December 1, 1971.

Later the same day, appellant was again brought before the Court. Counsel for appellant, though speaking "in mitigation of any punishment for contempt", argued that the contempt was civil and that appellant could purge himself at any time. The Court noted that the hearing had not ended, that appellant was at liberty to testify, but referred to counsel's suggestion that appellant could purge himself as "your words, not mine". Previously, the Court had been similarly non-commital when counsel had suggested that the contempt was civil. Appellant did not offer to testify. Sentence was then pronounced on twenty-three of the remaining thirty-one judgments of contempt, the sentences being for six months each, divided into four groups, the sentence for each group to begin "on and after" that for the prior group. The aggregate time to be served is twenty-nine months.

Appellant asserts first that no contempt was committed, since the Commonwealth's stipulation did not grant immunity coextensive with the Fifth Amendment. Secondly, he

contends that if any contempt was committed, the sanction imposed by the court was coercive, the sentence being civil and expiring with the termination of the proceeding. Thirdly, if indeed the contempt judgments were criminal, he asserts that error was committed in resorting to summary punishment, without notice and hearing. Finally, he urges that the twenty-nine month aggregate sentence, being multiple punishment for a single contempt, places him in double jeopardy, constitutes cruel and unusual punishment, and violates his right to trial by jury.

II. The Grant of Immunity

In our earlier decision denying bail we saw no substantial possibility that appellant could successfully challenge the efficacy of the Commonwealth's grant of immunity. We have since received no additional indication from appellant enlightening us as to how, if he had testified, he would have incriminated himself. The testimony was limited by order of the Court, both as to direct and cross-examination, to events prior to January 1, 1965. The statute of limitations has run on all crimes committed before that date, except such crimes as murder or treason which are in no way suggested by or related to the Court's proceeding. In the unlikely event that questions threatened to trench on any such area, the privilege could be asserted, under the Court's specific reservation. Moreover, no testimony or fruits thereof would be introduced in *any* criminal proceeding against appellant.

Despite the clear wording of the stipulation, appellant disputes the latter point. We observe that the danger of distinguishing tainted fruits from independently derived sources is in this case exceedingly remote, both because of the time period and subject matter covered by the proffered questions and the Court's order, and because, presumably, appellant's prior responses to the Chief Justice of the Superior Court would have furnished any leads, if leads

existed. To speculate, as to new leads, that the Court would permit direct examination to transcend the boundaries it defined would be to assault its integrity. And, while the determination of relevance in fixing the scope of cross-examination is within the sound discretion of the court, there are limits, including particularly the substantial rights of a party, *Commonwealth* v. *Granito*, 326 Mass. 494, 496 (1950), and, in this case, confinement to events prior to 1965.[3] Finally, the stipulation protects appellant from any prosecution for prior perjury which his testimony might otherwise justify.

The most expansive view of a constitutionally adequate grant of immunity is that it must give the witness protection from exposure to future criminal proceedings "as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution." *In re Emery's Case*, 107 Mass. 172, 185 (1871). Had appellant not been granted immunity and had he chosen to remain silent as to events prior to 1965, he would not thereby have had a better chance of escaping prosecution under the indictment for larceny and conspiracy allegedly occurring in 1968 and the years following. The two sets of events noted were largely independent of each other and evidence related to one would have had little relevance in any prosecution for the other. What appellant sought in return for his testimony was to be put in a better position than if he had remained silent as to events prior to 1965. He wished, as his counsel acknowledged, a blanket immunity from the most recent prosecution even though it related to wholly separate and subsequent transactions not implicated in the testimony sought to be elicited by the grant of immunity. Since by order of the court, the questioning was to be confined to events prior

[3] This provision of the Court's order disposes of appellant's concern that he might be questioned as to recent events if such would have a bearing on the issue of his credibility.

to 1965, since the statute of limitation had run on all conceivably relevant crimes committed during that period, since no testimony or fruits could be introduced in any criminal proceeding, and since no prosecution for prior perjury was to be permitted, the formula of *Counselman* v. *Hitchcock*, 142 U.S. 547, 586 (1892) ("absolute immunity against future prosecution for the offense to which the question relates") was satisfied. We conclude therefore that the Court succeeded in its painstaking effort to provide protection fully equal to the risk of incrimination involved in compelling appellant's testimony.

III. Civil Versus Criminal Contempt

Appellant's contention that his incarceration is for civil contempt proceeds primarily from the assumption that it could not be for criminal contempt, since the adjudication was made summarily, without due process safeguards. We consider his attack on the Court's summary power to hold a witness in criminal contempt later. Suffice it to state here merely our conclusion that appellant's contention is without merit—not because of the label which the Court subsequently affixed, but because the essential ingredient of a sanction for civil contempt was lacking, that is, the condition that the contemnor be released if he were willing to testify. *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966).[4] While the Court indicated that appellant was at liberty to testify, there is no suggestion that its imposition of a determinate sentence was conditional or that appellant could have purged himself. That the Court might well have modified

[4] Appellant also argues that a refusal to testify cannot be a basis for criminal contempt, citing the dictum in *Shillitani*, 384 U.S. at 368, which was borrowed from the distinction in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911), "between refusing to do an act commanded . . . and doing an act forbidden . . . [which] generally, if not universally, affords a test to determine the character of the punishment." *Id.* at 443. Whatever application this distinction may have elsewhere, it has none to refusals to testify. *See, e.g., Yates* v. *United States*, 355 U.S. 66 (1957).

sentence had appellant testified would have been in accord with common practice of giving some weight in determining the length of sentence to an act in mitigation. *Groppi* v. *Leslie*, — U.S. — (Jan. 13, 1972, 40 U.S.L.W. 4149, 4152 n. 11).

The suggestion that *Shillitani* requires that the Court impose civil sanctions as a precondition to the imposition of a criminal penalty overstates the holding in that case. The *Shillitani* requirement, even for federal courts, is merely that a judge "consider the feasibility" of civil contempt. 384 U.S. at 371 n. 9. Even if this requirement applies to state courts, *but see United States* v. *DiMauro*, 441 F.2d 428, 435 (8th Cir. 1971), the recurrent parrying here between the Court and counsel as to whether the contempt was civil or criminal is evidence that the issue was considered.

IV. Propriety of Summary Adjudication

Appellant argues, alternatively, that the Court was without power summarily to adjudicate him guilty of criminal contempt. Rule 42(a), F.R.Crim.P., provides in part that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." This rule reflects the common law, *Bloom* v. *Illinois*, 391 U.S. 194, 209 (1968). Although we have held that refusal to answer questions before a grand jury cannot be punished summarily, we have recogized that refusal to answer in the "actual presence" of the court can be so dealt with. *Carlson* v. *United States*, 209 F.2d 209, 216 (1st Cir. 1954). We are mindful that in *United States* v. *Pace*, 371 F.2d 810 (2d Cir. 1967), the court extended the holding in *Harris* v. *United States*, 382 U.S. 162 (1965), proscribing summary procedure for one refusing to testify before a grand jury, to refusals to testify in court. Not only, however, was *Pace* apparently based on the

supervisory powers of a federal appellate court, *Nelson* v. *Holzman*, 300 F. Supp. 201, 202 (D. Ore. 1968), but we draw from the recent opinion of the Supreme Court in *Groppi* v. *Leslie, supra*, a clear intimation that no exception to summary contempt procedure for in-court conduct is recognized for orderly refusals to testify.

In *Groppi*, the Supreme Court, through Chief Justice Burger said:

> "Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations.[8] Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. See *Levine* v. *United States*, 362 U.S. 610, 613-614 (1960); *Brown* v. *United States*, 359 U.S. 41, 52 (1959); *United States* v. *Sacher*, 182 F.2d 416, 418 (CA 2 1950), *aff'd*, 343 U.S. 1 (1952)."

[8] "The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge. See *Johnson* v. *Mississippi*, 403 U.S. 212, 214-215 (1971); *In re Oliver*, 333 U.S. 257, 275-276 (1948)."

What we discern in this statement is not only that it is categorical, and that all of the criteria fit mere refusals to testify fully as much as violent conduct, but that the citations of *Levine, Brown*, and *In re Oliver*—all three cases involving only refusals to testify—suggest that non-violent, event polite, recalcitrance can be subject to summary procedure.[5]

[5] We would also note the Supreme Court's reference to the present practice of Parliament, which specifies as a basis for summary contempt procedure "where a witness . . . refuses to answer . . . ." 40 U.S.L.W. at 4153 n. 12.

We therefore hold that the Court acted within its power in summarily adjudicating appellant guilty of criminal contempt. While this holding disposes of appellant's argument that he was entitled to notice and hearing, *In re Oliver*, 333 U.S. 257, 275 (1948), we must observe that, as both our prior and subsequent discussions reveal in some detail, appellant had lengthy notice of the seriousness of his affront to the Court and of its resistance to any suggestion that it deem that affront a civil contempt. He also was in effect given a substantial hearing in which his counsel elaborated at length his reasons in persisting in what both the Court and we have held was an unfounded claim of privilege.

V. Validity of Multiple Penalties

A more troublesome issue relates to the Court's finding petitioner in contempt for his refusal to answer each of the forty-five questions put to him, dividing thirty-five of the offenses into five groups, imposing concurrent sentences for each group, and providing that the five group sentences run consecutively, so that the entire duration of time to be served in jail is twenty-nine months. Petitioner argues that this disposition denied him his right to a jury trial, placed him in double jeopardy, and subjects him to cruel and unusual punishment.

The Court recognized the requirement of *Bloom* v. *Illinois, supra* at 210, that criminal contempts be treated like other crimes insofar as right to jury trial is concerned, and the subsequent holding of *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970), that no offense can be deemed "petty" and therefore triable without a jury where more than six months imprisonment is authorized, or, in the case of contempts, imposed, *cf. Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), *Bloom, supra* at 211. But unlike *Bloom*, the Court here reasoned that appellant committed not one but a series of distinct contempts, no one of which merited more than a

penalty of six months.[6] Moreover, the Court held that *Bloom's* requirement did not apply to the kind of contempt committed here—an orderly, though contumacious, refusal in the courtroom to answer questions, there being no genuine dispute as to the facts. *In the Matter of Edward J. DeSaulnier Jr. & Another*, 1971 Mass. Adv. Sh. 1817, 1822-23.

In elaborating on its conclusion that multiple offenses had been committed, the Court addressed two issues: whether the questions related to different facts and subject matter permitting multiple penalties and whether petitioner had in his initial response sufficiently established an area of refusal covering all the questions so that only a single contempt was committed. As to the first issue, the Court noted that each question sought to elicit new facts, and that, for sentencing purposes, the questions had been divided into "broader subjects of inquiry". As to the second issue, the Court held that petitioner never carved out an area of refusal as did the witness in *Yates* v. *United States*, 355 U.S. 66, 71, 73 (1957), and in *People* v. *Riela*, 7 N.E.2d 571, 576-78 (Ct. App. 1960), but, as in *People* v. *Saperstein*, 2 N.Y.2d 210 (Ct. App. 1957), allowed the questioner reasonably to suppose that he might answer one or more subsequent questions. The Court concluded its opinion by acknowledging its awareness of possible constitutional limits on consecutive sentences, which had led it consciously to avoid an "excessive" aggregate.

The law, federal and state, applicable to penalizing the kind of criminal contempt which consists of an unjustifiable

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[6] Counsel for respondent (petitioner's custodian) would have us regard this ruling as unreviewable "for [the Court's] conclusion is not dependent upon the application of any principle of the Federal Constitution." The answer, of course, is that the Fifth Amendment guarantee against double jeopardy, is enforceable against the States through the Fourteenth Amendment, and "protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

reliance on the Fifth Amendment in refusing to answer questions in court is more harmonious in result than in rationale. It seems to be generally recognized that the issue is distinct from whether the refusals to answer could be made the subject of separate counts in an indictment.[7] Beyond this, as the authorities cited, *infra,* indicate, most courts have concluded that separate refusals to answer questions in the same proceeding, prior to punishment,[8] particularly when the refusals are based on the privilege against self-incrimination,[9] cannot be the subjects of multiple contempt penalties. *See, e.g.,* Annotation, 2 L.Ed.2d 1594, 1595.

The rationale of the decided cases is most often decriptive of the result reached rather than of prescriptive value for future cases. There is, of course, as we have noted, recognition of the inherent power of a court to punish unjustified refusals to testify in the courtroom by summary criminal contempt procedures. There is corresponding recognition of the inherent power of a court to punish unjustified refusals to testify in the courtroom by summary criminal contempt procedures. There is corresponding recognition that such summary power must be used with restraint. Even though restraint may be seen to limit a court's self-protective ability, such is required by the protections to be accorded individuals. *Bloom* v. *Illinois, supra*

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[7] *United States* v. *Orman*, 207 F.2d 148 (3d Cir. 1953); *United States* v. *Kamin*, 135 F. Supp. 382 (D. Mass. 1955); *United States* v. *Emspak*, 95 F. Supp. 1012 (D.D.C. 1951); *United States* v. *Yukio Abe*, 95 F. Supp. 991 (D. Hawaii 1950); *People ex rel. Amarante* v. *McDonnell*, 100 N.Y.S.2d 463 (Sup. Ct. 1950); 94 A.L.R.2d 1246, 1247-48; 2 L. Ed.2d 95.

[8] A different situation exists when a witness is once punished for refusal and is then recalled and asked the same or similar questions. Cases are collected in 94 A.L.R.2d 1246, 1254 ff.

[9] When refusals are based on other reasons than the privilege, different conclusions and analyses may be applicable. *See, e.g., People* v. *Saperstein*, 2 N.Y.2d 210, 159 N.Y.S.2d 160 (Ct. App.), *cert. denied*, 353 U.S. 946 (1957), where the witness relied on failure of memory to refuse to talk about five separate telephone conversations.

at 201-08. Courts are also wary lest prosecutors, by their sheer ingenuity in conceiving and stamina in asking multiple questions calling for slightly different answers, be able to proliferate offenses. *Yates* v. *United States, supra* at 73; *People* v. *Riela,* 7 N.Y.2d 571, 166 N.E.2d 840, 843 (Ct. App. 1960); *People ex rel. Amarante* v. *McDonnell,* 100 N.Y.S.2d 463, 467 (Sup. Ct. 1950). These observations are expressions of general policy and fall short of providing a legal litmus capable of deciding concrete cases.

Not uncommonly, courts have based their proscription of multiple penalties on their conclusion that refusal to answer a series of questions addressed to the same subject can amount only to a single offense. *Maxwell* v. *Rives,* 11 Nev. 213, 221 (1876) ["... the mere refusal of a witness to testify on [sic] the same trial on the same issue cannot be deemed more than one contempt..."]; *United States* v. *Yukio Abe,* 95 F. Supp. 991, 992 (D. Hawaii 1950 ["... as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictments therefore charge only one alleged offense"]; *United States* v. *Emspak,* 95 F. Supp. 1012, 1016 (D.D.C. 1951) ["one single line of inquiry which was the specific phase of inquiry then being considered"]; *Fawick Airflex Co.* v. *United Electrical, Radio & Machine Workers of America,* 92 N.E.2d 431, 436 (Ohio App. 1950), *appeal dismissed,* 154 Ohio St. 206, 93 N.E.2d 480 [refusals "a single contempt, for the reason that they all had to do with the same subject matter"]; *State* v. *Arnold,* 123 N.E. 2d 473 (Ohio C. P. 1954). *But see People* v. *Epps,* 299 N.Y.S.2d 878 (App. Div. 1969).

While such a conclusory formulation as "single subject" or "single line of inquiry", or "same subject matter" may be sufficient to describe the disposition of cases in which a prosecutor has simply reframed in various forms a question addressed to whether the witness was a Communist, it

is less helpful when different but additionally relevant and interconnected facts are sought to be elicited. The concept of a "single subject" is frustratingly open-ended, there being infinite ways of categorizing information in terms of time, place, incident, transaction, people, etc. Moreover, the use of such phrases as "single subject" as the basis for defining a contumacious refusal to testify involves the invocation of a wooden rubric devoid of any relation to policy.

We gain more guidance by noting, first, the precise nature of the contempt involved in this kind of case. Refusal to testify here is made contemptuous for no other reason than that the Fifth Amendment does not justify it, coextensive immunity having been offered as a substitute. The contempt lies in asserting the privilege against self-incrimination as to sought-for testimony which, because of the Court-approved stipulation of the Commonwealth, would not incriminate. With this perspective, three cases seem to us particularly helpful: *United States* v. *Costello,* 198 F.2d 200 (2d Cir.), *cert. denied,* 344 U.S. 874, *reh'g denied,* 344 U.S. 900 (1952); *Yates* v. *United States, supra*; and *People* v. *Riela, supra.*

In *Costello,* the witness, while not relying on the privilege against self-incrimination, made it clear that because he was not feeling well he would not answer any questions on a particular day. The Court, through Augustus Hand, J., said:

> "But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were

not separately punishable. [citations omitted]" 198 F.2d at 204.

In *Yates* the witness had not made an initial blanket refusal to testify, but on cross-examination had refused to identify a number of persons as Communists, giving as her reason that she did not want them to suffer harassment or be hurt. The Court held that only one contempt had been committed, since the witness had drawn "the lines of refusal [though] in less sweeping fashion [than by a flat refusal to answer any questions] by declining to answer questions within a generally defined area of interrogation...." 355 U.S. at 73. She had "carved out an area of refusal", *id.*, within which the prosecutor could not multipy contempts.

In *Riela* the witness refused at the outset of inquiry to answer any questions relating to the "Apalachin meeting" of supposed gangsters, and subsequently declined to answer seventeen questions on the same subject. While this might be said to be a "carving out" of an area of refusal, it was this meeting which was the grand jury's entire "target of investigation", 166 N.E.2d at 842. The court, through Fuld, J., deemed irrelevant the fact that the questions asked were by no means the same and called for different answers, adding:

> "What is of significance is that it was apparent from the very start of his interrogation that Riela, relying upon the privilege, would decline to answer any question bearing on the 'Apalachin meeting', and that the questions, different though they were from one another, all related to that one subject. This being so, he is guilty of the single contempt of refusing to give testimony concerning the Apalachin gathering, rather than 17 contempts for refusal to answer individual questions about it. [citations omitted]" 166 N.E.2d at 842-43.

The court addressed not only the effect of an initial refusal to answer but the pressure on a witness to avoid waiver of a privilege once asserted: "Riela, under existing law, may well have been under the necessity, once he asserted the privilege, of repeating the claim as to each and every question asked him, lest an answer to any one be deemed to effect a complete waiver of the privelege. [citations omitted]" *Id.* at 843. In other words, the scope of the waiver was also seen as a means of defining a discreet offense. Repeated refusals to answer questions, when the refusals are based on the privilege against self-incrimination, may not only be reasonably expected by the prosecutor from the notice given initially by the witness; they may also be reasonably expected, if the law of the jurisdiction deems any one answer in the chain of questioning a waiver of the privilege as to subsequent questions.

A. Notice

We examine first the question whether petitioner adequately gave timely and unambiguous notice that he would claim his privilege against self-incrimination as to all questions that might be put to him. Unlike most other cases that have come to our attention, resolution of this issue in the present case requires the setting out of a considerable chronology of events related to the claim of privilege. On or about October 29, 1971, petitioner was served with a subpoena to appear with record before the Court on November 15. On or about the latter date, petitioner moved to quash the subpoena, asserting his Fifth Amendment rights. Three days later, on November 18, the fourth day of the Court's hearing, petitioner was called to the stand. His counsel said, "I should like to once again ask the Court not to put Mr. Baker on the witness stand. I can assure the Court that insofar as he is able and permitted, he will plead the 4th and 5th Amendment in answer to various questions." On the next day, Special Counsel read to petitioner all the

questions which had been put to him earlier by the Chief Justice of the Superior Court—some 224 in number. When the Court reconvened on November 22, the petitioner, asked if he intended to answer questions put to him, replied, "Sir my answer is No. I am relying on the Fourth and Fifth Amendments of the Constitution of the United States because of the indictments now pending against me; I respectfully decline to answer." Petitioner was pressed with the further question: "And that goes to any of those questions?" He answered, "Yes, sir."

Thereafter, as we have noted, came the efforts to devise a stipulation, binding on the Commonwealth, which would effectively protect petitioner against prosecution directly or indirectly based on the testimony he would give. Finally, after three amendments, the stipulation achieved its present form on November 29. Counsel for petitioner, however, made it clear that he did not accept it. Petitioner was again called to the stand, was asked the first question, "Now, directing your attention, Mr. Baker, to the year 1961, did you at some time in the fall of that year meet a man named Michael Raymond?", and refused to answer, using virtually the same words in invoking the Fourth and Fifth Amendments he had used nine days earlier. Special counsel then asked, "Mr. Baker, are you going to refuse to answer any and all questions I put to you, which questions I represent to you will be confined by their terms to the years 1961 and 1962?" Petitioner again replied, "Relying on the Fourth and Fifth Amendments to the Constitution of the United States, I respectfully decline to answer." Special counsel then said, "In view of the failure of the witness to answer the first question and in failing to answer even the second question, perhaps I should ask the Court if you wish me to continue my examination question by question." The Court stated, "The Court feels special counsel should proceed to interrogate this witness." Thereupon, forty-three more

questions were asked, each receiving the same ritual reply.

The Court felt it "significant" that petitioner declined to answer when asked whether he was going to refuse to answer any and all questions. It deemed irrelevant, however any positions taken by petitioner prior to the stipulation. And it held, apparently likening this case to *People* v. *Saperstein, supra,* that petitioner had not carved out "an area of refusal" within *Yates* and *Riela.*

With natural reluctance to differ with a court on a matter so intimately related to that court's own dignity, we feel compelled to disagree. In the first place, we think that the question is not whether petitioner carved out a more limited area of refusal within a broader subject of inquiry, but whether, as in *Costello* and in *Riela,* there was an initial total refusal to answer all questions related to the object of the inquiry. The information made it clear that the inquiry sought to disclose if, through Baker's efforts, a judge had improperly interfered in the disposition of a criminal case. The area of questioning was known to petitioner. His successive representations could only be viewed as relating to the entire inquiry—in effect, a tailored rerun of the interrogation which had already been conducted. In view of the refusal of petitioner's counsel to accept the final stipulation, it is not apparent to us why petitioner's flat pre-stipulation refusal should be deemed irrelevant. It is true that his answer to Special Counsel's question of November 29, looking to his intent as to all future questions was not, technically, an answer, but a refusal to answer. That the import of petitioner's reply boded a future pattern of refusal was indicated by special counsel's question to the Court as to whether he should continue. This being a criminal proceeding, moreover, it seems to us that doubts on this score would be resolved in his favor. *Cf. United States* v. *Kamin, supra* n. 7, at 384.

The Court's apparent reliance on *People* v. *Saperstein*

was misplaced. In that case the witness was evasive in replying to five questions attempting to identify the participants in five separate telephone conversations. The fact that he could not tell whether he had taken part in one conversation did not signal to the prosecutor that his memory would be equally poor as to others. It seems to us that the instant case falls within *Riela*, and not *Saperstein*, for the very reasons set forth by Judge Fuld in *Riela*. Here the Court, as well as petitioner, knew the scope and nature of the questions to be asked. The petitioner having refused to say whether he had met Raymond in the fall of 1961 —" which could well have furnished 'a link in the chain' ", *Emspak* v. *United States*, 394 U.S. 190, 200, 201 n. 24 (1955) —it seems clear *a fortiori* that he would continue to refuse to answer questions getting closer and closer to the target. We therefore conclude that petitioner's contempt lay in refusing to testify at all on the subject of inquiry, that his communicated intent made it clear at the outset that the authority of the court was frontally challenged and the seriousness of the offense fully delineated, and that the contempt could not thereafter be multiplied forty-three times by running through the entire list of questions.

B. Waiver

Apart from any staking out of a claim by petitioner at the outset of the questioning, a second approach to ascertaining the numerosity of contempts lies in considering whether and when petitioner, by answering a question, would, by the law of the Commonwealth, have waived his privilege as to the remaining questions. This factor was, as we have observed, noted by Judge Fuld in *People* v. *Riela*, *supra*. That is, while a witness might be mistaken in claiming his privilege, the offense in claiming the privilege is not multiplied by refusals to answer in order to protect the privilege claimed. Or, perhaps more succinctly, one claim of privilege,

followed by refusals to waive it, does not thereby become multiple claims.

The thought underlying the doctrine of waiver by testifying seems to be that when incriminating responses have already been made, the value to a witness of suppressing further incriminating answers may not be so great as to outweigh the prejudice to another involved person if the testimony is allowed to remain in its witness-selected posture, quite possibly one-sided and distorted. 8 Wigmore on Evidence, § 2276, at 456-58 (McNaughton rev. 1961). Here, of course, the two judges who were the objects of the information could be deeply affected by any such attempted tailoring or cut-off in testimony by petitioner. Massachusetts case law on this issue is venerable but, so far as we can learn, still vigorous in establishing that "the witness must claim his privilege in the outset, when the testimony he is about to give, will, if he answers fully all that appertains to it, expose him to a criminal charge, and if he does not, he waives it altogether. *Foster* v. *Pierce*, 65 Mass. 437, 439 (1853). In *Commonwealth* v. *Price*, 76 Mass. 472, 476 (1858), the impact of a witness's testimony on others was recognized: "If a witness consents to testify at all, so as to criminate himself as well as the defendant, in the matter on trial, he must answer all questions legally put to him concerning that matter." *See also Commonwealth* v. *Pratt*, 126 Mass. 462, 463 (1879); *Evans* v. *O'Connor*, 174 Mass. 287, 291 (1899).

Under this rigorous waiver rule, petitioner would have had difficulty terminating his testimony, once proffered, at any point. In making this observation, we are not concerned with grouping the questions taxonomically, although we do have doubts as to the mutual exclusivity of the Court's groupings.[10] What does appear to us is that once petitioner

[10] The grouping was as follows:
Group I—12 questions: petitioner's "involvements with Raymond

acknowledged acquaintance with Raymond, the detailed facts of any communication would have been compellable; this would have opened up petitioner's efforts to secure the services of a judge's friend for Raymond, the events surrounding appearances, continuances, and final disposition of Raymond's Middlesex County criminal case; and, of course, with the drama about played out, the final meeting of the cast at the Darbury Room would follow. The information, after all, clearly spelled out the area of possible misconduct of the two judges, that is, that misconduct was "averred, principally at least, to have taken place with respect to a criminal case in Middlesex County".[11] Under Massachusetts law, we think petitioner, once having answered a question or two, would be deemed to have waived his privilege for the remaining interrogation. So viewing the situation faced by petitioner, we refuse to say that he faced the dilemma of incurring multiple penalties for continued refusals to answer or of waiving his privilege if he tried to keep his contempts to a minimum. So for this added

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in the fall of 1961 and the spring of1962." In addition, we do not see why No. 14 of Group II and Nos. 17 and 21 of Group II are not properly in Group I.

Group II—2 questions: petitioner's "involvements with Raymond in June 1962". Similarly, we would suppose that Nos. 5, 8, 9, 10, 11, 12 and 22 of Group I and Nos. 17 and 21 of Group III fit this category.

Group III—12 questions: petitioner's "involvements with Raymond in September, 1962, particularly with respect to what transpired on September 27 and 28". No. 22 of Group I and No. 34 of Group V would apparently fit under this heading.

Group IV—6 questions: petitioner's "alleged relationship with Judges DeSaulnier and Brogna in September 1962". No. 35 of Group V would apparently qualify in this Group.

Group V—3 questions: petitioner's "alleged meeting with Raymond and Judge DeSaulnier at a public place known as the Darbury Room on September 28, 1962. Two of the three, as above indicated, might equally well be placed in other groups.

[11] That our summary of the list of questions is not unfairly abbreviated can be seen by noting the Court's own summary of the information which we have reproduced in the second paragraph of this opinion.

reason, that petitioner's reputed refusals were in response to a legitimate interest in protecting his initial resort to the privilege, rather than to effect multiple affronts to the Court, we hold that only a single contempt was committed.

VI. Length of Incarceration

While the Court notes in its opinion that there are no facts in dispute and no purpose to be served by a jury trial if a longer sentence is sought to be imposed, we find no basis in the categoric language of *Bloom* v. *Illinois*, 391 U.S. at 208-10, delineating such an exception to the jury trial requirement for major crimes. Furthermore, it would seem entirely proper for a jury to consider the extent of intent to affront a court, even in a factually limited situation such as this. Ordinarily, this would give the Court sitting without jury a ceiling of six months. As it happens, however, the first contempts adjudicated merited, in the Court's view, a five-month sentence. Presumably, the offenses subsequent to the twelve on which sentence was first imposed drew a six-month term because they were considered additional and therefore more serious. Under our holding that only one offense was committed, and that at the outset of the questioning, we think due process would be violated by the imposition of a harsher sentence than that imposed for the first offense adjudicated. *Cf. North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

We therefore reverse and remand this matter to the District Court with the direction that the writ be issued if, within thirty days from the date of this opinion the aggregate sentence summarily imposed on petitioner is not revised so that it will not exceed five months.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 71-1399.

I. CHARLES BAKER,
PETITIONER, APPELLANT,
v.
THOMAS S. EISENSTADT, SHERIFF, ETC.
RESPONDENT, APPELLEE.

JUDGMENT
Entered February 23, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the cause is remanded to that Court with the direction that the writ be issued if, within thirty days from the date of this judgment, the aggregate sentence summarily imposed on petitioner is not revised so that it will not exceed five months. No costs.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Keating and Mayo.]